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IN THE

Supreme Court of the United States

October Term, 1967

No. 453

BILLY RAY GRIMES,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE
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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit as to Count IV of the indictment, entered in the above entitled case on June 30, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in Appendix C, is unreported at this time.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

(1) Whether a conviction for conspiracy to violate Federal Interstate travel to further state unlawful activities statute requires the same knowledge and intent to support conviction of the underlying substantive statute.

(2) Whether a conviction for conspiracy may be supported by the same evidence held insufficient to support conviction for the underlying substantive offenses without violating the Fifth and Fourteenth Amendments of the Constitution of the United States.

STATUTES INVOLVED

The statutory provisions involved are 18 U.S.C.A., Sections 2, 371 and 1952. They are printed in Appendix A, infra, pp. 10 and 11.

STATEMENT

Counts I and III of the indictment charged violations of 18 U.S.C.A., Sections 2 and 1952. Conviction on these counts was reversed because of insufficient evidence. Petitioner's conviction under the Conspiracy Count IV was affirmed and sentence of two years probated for four years was imposed.

The conviction of Petitioner under Conspiracy Count IV amounted to conviction not only upon insufficient evidence, but upon no evidence of knowledge or intent to violate 18 U.S.C.A., Section 1952.

The evidence stated in the light most favorable to the Government is set out in Appendix B, pp. 12-14.

Petitioner filed motion for judgment of acquittal to preserve the insufficient and no evidence point.

The evidence was such that the proof offered as to the substantive counts of the indictment was one in the same as that offered to prove the conspiracy count.[1] Petitioner predicates his argument on the failure of the Government to prove beyond a reasonable doubt that he entertained the specific intent necessary to violate 18 U.S.C.A. 1952, and thereby constituted him part of the alleged conspiracy. The proof must show that each conspirator had the specific intention to violate the substantive offense, *Ingram v. U.S.*, 360 U.S. 672 (1959),

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[1]Consolidating the evidence presented under Counts One and Three, the substantive offenses, proof as to Grimes' knowledge of, and participation in the conspiracy showed that he was working at the dice tables when Jackson and Trigg lost large sums of money gambling; that he was present when Jackson and Gilbert were discussing payment of Jackson's gambling debt, although nothing was said as to the manner of payment and Grimes did not participate in the discussion nor was he shown to have heard it; that he received two long distance phone calls from Driscoll in Billings, Montana, while Driscoll was collecting Jackson's debt; that he received $1,400 from Meadows after Meadows cashed the check from Trigg; but no showing was made as to what the $1,400 represented; that he was associated with Meadows and two other unidentified men in a partnership bank account in 1959; that he was associated with Meadows as a partner in a private club which was located at one of the gambling sites, although the bank account card identifying this partnership was closed out two years before the alleged offenses occurred; that he and Meadows were the co-grantees of one of the gambling sites in a 1962 warranty deed; and that Grimes was a gambler by occupation.

and mere knowledge of the conspiracy, *Falcone v. U.S.*, 311 U.S. 205 (1940), or association with the conspirators, *Moloney v. U.S.*, 200 F.2d 344 (7 Cir. 1952) is not sufficient to convict one of conspiracy. Assuming, but not conceding, that the evidence is sufficient to establish that Grimes, Driscoll, Meadows and Gilbert conspired to conduct a dice game in violation of the laws of the State of Texas, it would not, nevertheless, be evidence, either direct or circumstantial, that any of them conspired to violate the federal law. *Ingram v. U.S.*, 360 U.S. at 678-679. In *Ingram*, two of the petitioning conspirators charged with violating the federal wagering laws, were found to have been "intimately connected" with the operation of a lottery and to have cooperated in conducting it secretly. In reversing their conviction the Court stated:

> "While the record clearly supports a finding that Smith and Law were participants in a conspiracy to operate a lottery and to conceal that operation from local law enforcement agencies, we find no warrant for a finding that they were, like Ingram and Jenkins, parties to a conspiracy with a purpose illegal under federal law." at 677

While the evidence against Grimes may well support a finding that he was part of a conspiracy to violate state law, there was no *independent proof* that Grimes knew the interstate travel was being conducted with the specific unlawful intent, *Ingram v. U.S.*, 360 U.S. at 680, for without such knowledge the equivalent intent on the part of Grimes could not exist. *U.S. v.*

Falcone, 311 U.S. 205 (1940), *Direct Sales Co. v. U.S.*, 319 U.S. 703 (1943). The crux of the Government's case against Grimes was the telephone call he received from Driscoll from Billings, Montana. By the evidence, the prosecution sought to raise the inference that Grimes obtained knowledge of the entire conspiracy and possessed the necessary intent. Without evidence of the content of the phone call, however, the most such evidence can prove is that Grimes knew only that Driscoll had traveled in interstate commerce. To allow the Government the inference it seeks would be to violate a long standing rule established by the Supreme Court.

> "While (the intent of one co-conspirator to violate the law) is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist * * *. Furthermore, to establish the intent, the evidence of knowledge *must be clear, not equivocal* * * * This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning * * * a dragnet to draw in all substantive crimes." *Direct Sales Co. v. U.S.*, 319 U.S. at 711. (Emphasis Added)

Furthermore, even if Grimes knew that the interstate travel of Driscoll was carried out with the specific unlawful intent, mere knowledge of the illegality of the activity is insufficient to convict Grimes of conspiracy in absence of a showing that he knew of the conspiracy to violate the federal law and participate in it. *Falcone v. U.S.*, supra.

Petitioner would draw the Court's attention to the fact that in a prosecution for conspiracy to violate 18 U.S.C.A. 1952 the substantive offense must have been committed in furtherance of, and within the scope of the plan and not merely as an *unforeseen part* of the ramifications of the project. *U.S. v. Barrow*, 229 F. Supp. 722 (E.D. Pa. 1964), at 733. In order for the interstate aspects of the instant case to have been foreseen, it would have been necessary to amass a series of extremely contingent presumptions, to wit: (1) that Jackson and Trigg would gamble; (2) that they would lose; (3) that they would lose more money than they had on their persons; (4) that they would give personal checks to cover their losses; (5) that the checks would not be covered by sufficient funds; and (6) that Driscoll and an unknown person selected by Meadows, would have to travel in interstate commerce to collect the money. To charge a conspiracy to commit an offense which can only materialize in the event a series of contingencies is realized is to stretch the conspiracy dragnet to rather absurd extremes.

The evidence failed to establish that the unlawful activity in violation of state law alleged in Count III of the indictment was of a continuous nature so as to bring the interstate travel within the scope of 18 U.S.C.A. 1952.

REASONS FOR GRANTING THE WRIT

(1) The decision of the Court below is in conflict with the principles expressed in *Ingram*, 360 U.S. 672

which requires the conspirator to have the same specific intention to violate the substantive statute, Title 18, Section 1952, U.S.C.A. and with *Falcone*, 311 U.S. 205 that mere knowledge of a conspiracy is insufficient to convict.

(2) This Court in exercise of the power of supervision of the lower federal courts should grant this petition and review the two questions to insure an orderly interpretation of the relationship of the underlying substantive offense statute and the conspiracy statute as to "intent and knowledge". Judicial supervision of administration of criminal justice in federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence, and such standards are not satisfied merely by observance of those minimal historic safeguards, for securing trial by reason, which are summarized as "due process of law". *McNabb, et al v. United States*, 318 U.S. 332. In *Marshall v. United States*, 360 U.S. 310, the Supreme Court held that exposure of some of the jurors during trial to newspaper articles concerning prior convictions for practicing medicine without a license when trial court had refused to permit prosecutor to introduce such evidence was so prejudicial as to entitle accused to a new trial.

In passenger's action for personal injuries against railroad, the deliberate and intentional exclusion from the jury list of all persons who worked for a daily wage was improper, and denial of motion to strike jury panel was error requiring reversal of judgment in exercise of Supreme Court's power of supervision over

administration of justice in federal courts. *Thiel v. Southern Pac. Co.*, 328 U.S. 217.

The Supreme Court also exercises supervisory power over contempt proceedings (*Sacher, et al v. United States*, 343 U.S. 1) and also over construction of the federal rules of civil and criminal procedure(*Upshaw v. United States*, 335 U.S. 410; *Hickman v. Taylor*, et al, 329 U.S. 495).

This is a question of prime importance.

(3) A conviction of a serious federal crime supported by "no evidence" violates the Fifth and Fourteenth Amendments of the Constitution of the United States. *Thompson v. City of Louisville*, 362 U.S. 199; *Turner v. State of Louisiana*, 379 U.S. 466; *Garner v. State of Louisiana*, 368 U.S. 1571, and *Taylor v. State of Louisiana*, 370 U.S. 154.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CHARLES W. TESSMER, attorney for Billy Ray Grimes, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of August, 1967, I served one copy of the foregoing Petition for a Writ of Certiorari on:

Honorable B. H. Timmins, Jr.
Assistant United States Attorney
P. O. Box 153
U.S. Post Office and Courthouse
Dallas, Texas

Honorable Thurgood Marshall
Solicitor General of the
United States
Justice Department
Washington, D. C.

by mailing a copy in a duly addressed envelope, postage prepaid, to the above parties at the respective addresses.

CHARLES W. TESSMER

APPENDIX A

STATUTES INVOLVED

Title 18, U.S.C.A., Section 2; Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

Title 18, U.S.C.A., 371; Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to affect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, U.S.C.A., Section 1952; Interstate and foreign

travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or forgein commerce, including the mail, with intent to -

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in sub-paragraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the laws of the United States, or (2) extortion or bribery in violation of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

APPENDIX B

THE EVIDENCE

(1) The testimony of the witness Jackson (R. 1-41), that he lost $50,000 in a dice game; that Driscoll, the principal defendant in Count One and a co-defendant conspirator in Count Four, traveled to Billings, Montana, to collect a portion of the gambling debt; that Petitioner Grimes was present working at the dice table when he lost his money; that Grimes was present in the house the following morning when Jackson was discussing the satisfaction of his debt with Gilbert, a co-conspirator, but not a defendant.

(2) The testimony of the witness Trigg (R. 72-90) that he lost $7,000 in a dice game; that Meadows, the principal in Count Three and a co-defendant conspirator in Count Four, sent a man to Oklahoma City, Oklahoma, to collect a portion of that gambling debt from him; that Petitioner Grimes was present working at the dice table when Trigg lost his money.

(3) The testimony of Gilbert, (R. 91-123), a co-conspirator not named as a defendant, that Grimes was present when he and Jackson were discussing Jackson's debt and that Grimes did not participate in the discussion and that no aspects of the interstate travel were discussed at that time; that Meadows had the $7,000 check from Trigg cashed and four checks issued totaling $7,000 "to divide up the winnings"; that one of the four checks was made payable to Grimes which he cashed the following day.

(4) The testimony of the witness Vickery (R. 124-129) that he purchased from Meadows and Grimes real property upon which was located one of the houses in which the gambling took place. This purchase was subsequent to the dates of the alleged federal offenses.

(5) The identification by the witness Hawes, the deputy county clerk of Tarrant County, of a warranty deed naming Grimes and Meadows as grantees of one of the properties upon which the gambling took place (R. 130-134).

(6) The testimony of the witness O'Donnell, commercial manager of the Mountain States Telephone Company in Billings, Montana, that the company's records for the year 1962, were destroyed the following year (R. 139-143), followed by the testimony of an FBI agent from Billings, Montana, that prior to the destruction of said records he examined them and made notations therefrom which indicated that while the defendant Driscoll was in Billings, Montana, he completed two long distance phone calls to Grimes in Dallas (R. 144-149).

(7) An identification card for a partnership bank account, dated 1959, with the names "Grimes, Kirkwood, Meadows & Turns" upon it (R. 158; 161).

(8) An identification card for a partnership bank account in a private club showing Grimes and Meadows as partners in such club located at the address of one of the gambling sites (R. 96-97). This account

was closed out two years prior to the alleged offenses (R. 188).

(9) Grimes' individual income tax return for the year 1962, introduced solely for the purpose of showing his occupation to be that of gambling (R. 189-190).

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23,629

BILLY RAY GRIMES,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(June 30, 1967.)

Before GEWIN, COLEMAN, and GOLDBERG, Circuit Judges.

COLEMAN, Circuit Judge: The Grand Jury indicted

Edward Vincent Driscoll for [Count I] unlawfully, wilfully, and knowingly traveling in interstate commerce from Billings, Montana, to Dallas, Texas, with intent to distribute the proceeds of an unlawful activity, gambling in violation of the Laws of Texas, and with intent to promote, manage, carry on, and facilitate such promotion, management, and carrying of such unlawful activity, in violation of 18 *U.S.C.* § 1952.[1]

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[1] 18 *U.S.C.* § 1952.

Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

5a. Aiding and abetting

A defendant who furnished employment in Indiana in a gambling enterprise to three employees who resided in Illinois could be found guilty of violation of this section proscribing interstate travel or transportation in aid of racketeering enterprises on basis that such employment of Illinois residents

The Count further charged that Billy Ray Grimes and Albert Meadows knowingly, wilfully, and unlawfully aided, abetted, commanded, procured and induced the commission of the alleged offense. Driscoll and Meadows pleaded guilty to this Count and were sentenced to imprisonment. Grimes pleaded not guilty, stood trial to a jury, was convicted, and sentenced to two years imprisonment and a fine of $2,500.

Count III charged that Albert Meadows committed a similar offense in that he unlawfully, wilfully, and knowingly used and caused to be used facilities in interstate commerce, including the United States Mails in interstate commerce between Dallas, Texas, and Oklahoma City, Oklahoma, by causing to be transported a certain cashier's check with intent to distrib-

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amounted to an aiding or abetting of their interstate travel. *U.S. v. Zizzo*, C.A. Ind. 1964, 338 F.2d 577, certiorari denied 85 S.Ct. 1530, 381 U.S. 915, 14 L.Ed2d 435.

10. Evidence

That court determined that evidence was insufficient to support conviction for substantive offense of travel in interstate commerce, with intent to aid racketeering enterprises did not require that it strike and remove from jury consideration on conspiracy count all evidence indicating conspiracy prior to termination of events alleged under substantive count, where there remained substantial evidence from which jury could infer that conspiracy had begun prior to acts averred in substantive counts. *Marshall v. U. S.*, C.A. Cal. 1966, 355 F.2d 999.

Evidence of substantial course of illegal conduct, occurring reasonable time before and after act of interstate travel, allows jury to infer that travel was undertaken with intent to carry on unlawful activity. *U. S. v. Compton*, C.A. Tenn., 1966, 355 F.2d 872, certiorari denied 86 S. Ct. 1571, 384 U.S. 951, 16 L.Ed.2d 548.

Evidence failed to sustain conviction for interstate travel in aid of racketeering and interstate transportation of wagering paraphernalia. *U.S. v. Honeycutt*, C.A. N.C., 1962, 311 F.2d 660.

ute the proceeds and to promote, manage, and carry on the same unlawful activity alleged in Count I, and further charged that Driscoll and Grimes aided and abetted the commission of this offense.

Driscoll pleaded guilty to this count and was sentenced. Grimes pleaded not guilty, was convicted, and sentenced for this offense.

Count IV charged a conspiracy between Meadows, Driscoll, Grimes, and another to travel in interstate commerce and to use mail and wire facilities in interstate commerce as described in Counts I and III. Grimes was likewise convicted and sentenced on this Count.

The convictions as to Counts I and III must be reversed. The conviction as to Count IV will be affirmed.

Upon the verdict of the jury, and finding it supported by the evidence, we adopt the Government's appellate statement of facts, without quotation marks, as follows:

James Miles Jackson, an oil drilling contractor from Billings, Montana, met Ed Driscoll in Dallas in July, 1962. After discussing various prospects for oil ventures, Driscoll drove Jackson to a house located at Route 1, Box 608, Irving Texas. Upon their arrival Jackson observed a gambling game in progress. He met Al Meadows in the house and saw appellant Grimes working behind the dice table occupied by the stick man who handles the dice, brings them in after

they are rolled and pushes the dice to the next shooter. The banker, or box man as he is sometimes called, pays off and collects the bets. Grimes was working the dice game and was not engaged as a player. Jackson shot dice for three or four hours and gave checks to Al Meadows for his losses in the approximate amount of $50,000. Jackson was then driven to the airport by Edward Driscoll where he caught a flight to Duncan, Oklahoma that evening. He returned to Dallas the next morning and was again taken to the same house by Ed Driscoll where he met Al Meadows and co-conspirator Warren Gilbert, who was then Vice-President of the Greenville Avenue State Bank in Dallas. Gilbert was introduced to Jackson by Meadows as "our banker". Gilbert examined Jackson's financial statement and Jackson made arrangement to give Meadows interests in certain oil drilling operations in partial payment of the gambling debt. Jackson returned to his home in Billings, Montana where he was visited by Ed Driscoll in August, 1962. They discussed payment of the gambling debt and Jackson purchased a $5,000 cashier's check payable to the Greenville Avenue State Bank in Dallas, which he gave to Driscoll stating to him that "there is a check for part of the gambling debts". Special Agent Lawrence Talbot of the FBI testified from examination of records of the Mountain States Telephone Company (which were destroyed by the phone company after examination but prior to trial) that on August 20th, 1962, Ed Driscoll placed a call from the Northern Hotel in Billings, Montana, to appellant Billy Ray Grimes which was completed. The following day, August 21st, 1962, Ed Driscoll again placed a call from his hotel in Billings to Billy Ray

Grimes but was unable to get an answer. Later on the same day Ed Driscoll placed a call from Billings, Montana, to appellant Grimes in Dallas which was completed. Again, on the same date Ed Driscoll placed a call from his room in the Northern Hotel in Billings, Montana, to Dallas attempting to locate appellant Grimes; after Grimes failed to answer the call—the call was then made to Greenville State Bank in Dallas and the caller talked to co-conspirator Warren Gilbert. After Miles Jackson gave the $5,000 cashier's check to Ed Driscoll he subsequently had a telephone conversation with Al Meadows in which Meadows acknowledged receiving the check. (The evidence above related to Counts One and Four of the Indictment).

In a subsequent, similar occurrence Joe Dan Trigg, an oil drilling contractor from Oklahoma City, met Ed Driscoll in Dallas in June or July, 1962. In late September or October, 1962, Trigg accompanied Driscoll to a residence where he met Al Meadows and lost $7,000 in a dice game. He prepared a personal check payable to cash and thereafter returned to Oklahoma City. Trigg identified a photograph of the residence located at 1910 Copeland Road (also known as Baird Farm Road), Arlington, Texas, as the place where the dice game occurred. After several phone conversations between Meadows and Trigg it was agreed that Meadows would send someone to Oklahoma City to pick up a cashier's check from Trigg in exchange for the personal check which Trigg had originally given Meadows in payment of the gambling debt. Trigg purchased a $7,000 cashier's check on October 19, 1962,

payable to Al Meadows, which he handed to an unidentified man in front of a hotel and received the personal check which he had given Meadows at the time of the gambling loss. Trigg stated that the $7,000 represented the settlement of a gambling debt.

Co-conspirator Warren Gilbert testified that he had seen appellant Grimes at each gambling house where Jackson and Trigg shot dice and lost money. On those occasions Grimes was conducting the dice game. Government's exhibit No. 6 was a signature card reflecting a partnership checking account at Greenville Avenue State Bank for appellant Grimes and Al Meadows for a private club located at the Arlington gambling house, 1910 Copeland Road—Baird Farm Road.

Philip Vickery purchased the Arlington, Texas, residence at which Trigg lost the $7,000 from appellant B. R. Grimes and Al Meadows. Deed records of Tarrant County, Texas were introduced reflecting that Grimes and Meadows purchased the Arlington gambling house on August 30, 1962, and owned the house at the time of the dice games in question. After Trigg gave the $7,000 cashier's check to the unidentified person in Oklahoma City Al Meadows presented the check on October 22, 1962, to Warren Gilbert who was then President of the East Dallas Bank and Trust Company. In purchasing four cashier's checks representing a total of $7,000 Meadows told Gilbert "I would like to get some cashier's checks to divide up the winnings". Government's exhibit No. 10, was one of the four cashier's checks and was payable in the amount

of $1,400 to Billy Ray Grimes. Gilbert testified that on October 23, 1962, appellant Grimes in the company of Al Meadows entered the bank and asked Gilbert to approve the cashing of each of the four cashier's checks. The $1,400 cashier's check payable to Grimes was endorsed and cashed. Special Agent Durley B. Davis, Jr. of the FBI, an expert examiner of questioned documents, positively identified Grimes endorsement on government's exhibit No. 10 with the known signatures of appellant Grimes. After Grimes and Meadows cashed the checks they left the bank together. In connection with Grimes' operation of the dice games, Gilbert had observed Grimes extend credit to players, sell chips and take in money. Gilbert testified that during the summer of 1962 he frequently saw Grimes and Meadows together at the bank and at the gambling houses.

Government's exhibit No. 27 which was admitted into evidence reflected that appellant Grimes listed his occupation as "gaming" on his 1962 income tax return. He stated that the location of his business activity was "various".

At the close of the proof for the Government, Grimes moved for a judgment of acquittal on the ground that the evidence was insufficient to prove the offense charged. The motion was denied. The defense offered no proof, unsuccessfully renewed its motion for acquittal, and the case went to the jury.

As to Count I, Grimes is not charged with traveling in interstate commerce but with aiding and abetting

Driscoll in that activity. As to Count III Grimes is not charged with causing the transmission of the cashier's check in interstate commerce but with aiding and abetting Meadows in that activity. In order to convict him as an aider or abettor the Government had to show conduct on his part amounting to counselling or other assistance in the prohibited activity, 18 *U.S.C.* § 2; *Nye & Nissen v. United States*, 336 U.S. 613, 619, 69 S. Ct. 766, 93 L. Ed. 919 (1949); *United States v. Honeycutt*, 4 Cir., 1962, 311 F.2d 660.

From the foregoing proof, did the Government meet its burden? We are convinced that it did not. Reviewing the evidence, as we are bound to do, in the light most favorable to the Government, it is evident that Grimes was an integral part of a gambling operation in violation of the laws of Texas. He owned one of the houses, formerly had a "club" at the site of another, and acted as stick man and box man during the dice games in question. He was present when Jackson and an alleged co-conspirator discussed satisfaction of Jackson's gambling debt, but he did not participate in the discussion nor is it really shown that he actually heard the conversation. It would be reasonable to infer that he knew Driscoll went to Billings to collect the debt. He certainly received his share of the winnings from the check Meadows caused to be transported in interstate commerce. Where is the proof from which the jury could have inferred that Grimes counseled or assisted in the trip to Montana or the transportation of the check? The only really incriminating circumstance as to Count I is that Driscoll did telephone Grimes from Billings, but the content of the conversa-

tions is unknown. We consider it of some significance that Driscoll, the actor, did all the calling. Grimes did not call him. In the absence of further incriminating facts we cannot say that one is subject to conviction as an aider and abettor solely because he received a telephone call, of unknown content, from one who was actually committing the primary offense.

Remembering that Grimes is not here being prosecuted for violating the gambling laws of Texas, of which he clearly appears to have been guilty, the only really incriminating circumstance as to Grimes' aiding and abetting the transportation of the Oklahoma City check is the fact that he received part of the proceeds of that check in the form of another cashier's check purchased in Dallas. What did Grimes do to counsel or assist in the actual transportation of the Oklahoma City check? We can find no proof of this.

As we said in *Causey v. United States*, 352 F.2d 203 (1965), the Government proved that Grimes had every opportunity to become an aider and abettor but the proof is insufficient to establish that he actually became one.

Therefore, the conviction as to Counts I and III must be reversed.

As to Count IV, appellant concedes that the evidence may well support a finding that he was part of a conspiracy to violate state law, but he contends that there is no independent proof that Grimes knew the interstate travel or interstate transportation of the

check were being conducted with specific unlawful intent. We cannot agree with this view. Once a criminal agreement becomes operative and a defendant has joined a conspiracy (the evidence amply supports such a finding here), the acts of any member are attributable to each partner to the conspiracy and the partners act for each other in carrying out its objective, *Downing v. United States*, 5 Cir., 1965, 348 F.2d 594. The jury was not unreasonable in concluding, as it obviously did, that a conspiracy to lure out of state gamblers would most likely lead to the collection of gambling debts thus incurred by some form of interstate travel or communication and that Grimes foresaw such an eventuality. Judgment of conviction as to Count IV will thus be affirmed.

Grimes contends that the introduction of his 1962 income tax return in which he stated that his business was gaming violated his Fifth Amendment rights. We believe this contention to be without merit, *cf. United States v. Zizzo*, 7 Cir., 1964, 338 F.2d 577, cert. denied 381 U.S. 915.

Assuming, without deciding, that the law required Grimes to truthfully state his occupation on the 1962 return, that a false statement would subject him to a criminal penalty, and that he was thus forced to report as he did, he nevertheless had the right to claim self incrimination at that time. Not claiming it then, his statement amounted to a voluntary admission which we hold could be used in this prosecution.

Appellant's other assignments of error are found, upon consideration, to be without merit and do not justify further discussion.

The Judgment of the District Court will be affirmed as to Count IV and reversed as to Counts I and III.

AFFIRMED in part, and in part REVERSED.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 453

BILLY RAY GRIMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Northern District of Texas, following a jury trial, on count 4 of a five-count indictment (R. 303-311), charging that he conspired with two codefendants, Albert Meadows and Edward Driscoll, and with an unindicted person named Warren Gilbert, in violation of 18 U.S.C. 371 and 1952, to travel in interstate commerce and to use interstate mail and wire facilities with the intent to distribute the proceeds of a gambling enterprise conducted in violation

of Texas law.[1] On April 14, 1966, he was sentenced to two years' imprisonment, execution of the sentence was suspended, and he was placed on probation for four years (R. 365). The court of appeals affirmed (Pet. App. C).

The judgment of the court of appeals was entered on June 30, 1967 (R. 382). The petition for a writ of certiorari was filed more than 30 days subsequently, on August 4, 1967, and is thus out of time under Rule 22(2) of the Rules of this Court. In any event the petition presents no question which calls for further review.

The evidence adduced by the government may be summarized as follows:

On July 5, 1962, the defendant Driscoll drove James Jackson, an oil well drilling contractor, to a house in Irving, Texas, where a gambling game involving dice —an activity illegal under Texas law—was in progress (R. 42-43, 46-49, 92-93, 245-247). Petitioner was working behind the dice table—*i.e.*, on the side of the table occupied by the "stick" man (who retrieves the

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[1] Petitioner was also convicted on counts 1 and 3 (charging that he aided and abetted certain substantive violations of 18 U.S.C. 1952 by Driscoll and Meadows), but his convictions on those counts were reversed by the court of appeals because of insufficiency of the evidence to support them (R. 264, 303, 305-306; Pet. App. C 21-23). Count 2 did not involve petitioner. Count 5, which charged petitioner, Driscoll, and Meadows with another substantive offense, was dismissed at the trial on the government's motion (R. 212, 311). Driscoll and Meadows each pleaded guilty to certain substantive counts and the remaining counts (including the conspiracy count) were dismissed as to them (R. 271, 280-281, 300-301).

dice after a player has rolled them and then pushes them to the next player) and the "box" man (who collects the bets and pays off winners) (R. 50-52, 84, 95). He was not engaged as a player (R. 52). Jackson shot dice for three or four hours, lost $50,000, and gave personal checks in that total amount to the defendant Meadows, whom Jackson observed in and about the room during the proceedings (R. 48-50, 52-53). The next day, in petitioner's presence, Jackson discussed with Driscoll, Meadows, and the alleged co-conspirator Gilbert, the methods by which he might satisfy his $50,000 debt (R. 54-56, 99-101, 121). Gilbert, the vice-president of the Greenville Avenue State Bank, of Dallas, Texas, was introduced to Jackson by Meadows or Driscoll as "our banker" (R. 56). Jackson made arrangements to give Meadows an interest in certain oil well drilling operations in which he was engaged in partial payment of the debt (R. 55-57).

The following month Driscoll went to Billings, Montana—Jackson's home city—to try to collect part of the debt (R. 59-61). Driscoll told Jackson that Meadows "wanted payment on some of those checks" and asked Jackson when he would have some money for him (R. 60-61). On August 20, in part payment of the debt, Jackson purchased and gave to Driscoll a cashier's check in the amount of $5,000, payable—pursuant to an instruction which Gilbert had given Jackson when the matter was discussed in Texas—to the Greenville Avenue Bank (R. 61-62). On August 20 and 21, during and immediately following the

period of his negotiations with Jackson in Montana, Driscoll tried four times to reach petitioner by telephone in Dallas—twice successfully. Following one of the uncompleted calls, Driscoll placed and completed a call to Gilbert at the Greenville Avenue Bank (R. 143-147). Meadows later acknowledged to Jackson that he had received the $5,000 check (R. 61-67).

In October 1962, Joe Trigg, another oil well drilling contractor, of Oklahoma City, Oklahoma, was taken by Driscoll to a house in Arlington, Texas, where another dice game operated by Meadows was in progress (R. 72-73, 78-82, 93). Trigg shot dice, lost $7,000, gave Meadows his personal check in that amount in payment and returned to Oklahoma City (R. 80-83). Later Trigg agreed to give Meadows a cashier's check in lieu of his personal check (R. 84-85). On October 19, Trigg bought a $7,000 cashier's check, in Oklahoma City, payable to Meadows, delivered it there to an emissary of Meadows' sent from Texas, and took back his personal check (R. 85-89, 164). On October 22, Meadows took the $7,000 cashier's check to the East Dallas Bank and Trust Company, of which Gilbert was president, and told Gilbert that he wished to convert it into four smaller checks in order to "divide up the winnings" (R. 104-105). After Meadows had endorsed the $7,000 check, four smaller checks were issued in exchange for it—including one for $1,400 payable to petitioner, another to Driscoll for $2,800, and the remaining two for $1,400, made out to Meadows and a fourth individual (R. 106-109). Petitioner,

accompanied by Meadows, cashed his check the following day (R. 109-111, 203-204).

Petitioner and Meadows jointly owned the house in Arlington where Trigg incurred his loss (R. 125-126, 130-133) and had at one time maintained a partnership checking account for a "private club" located at that address (R. 96-98). Gilbert had observed petitioner both at the Irving and at the Arlington houses while gambling with dice was going on—five times at the latter establishment; in each instance petitioner was conducting the game, either as the "stick" or the "box" man (R. 93-95, 111-112). On at least one occasion Gilbert had seen petitioner extend credit to a player (R. 111-112). Petitioner gave his occupation as "gaming", and his business address as "various", in his 1962 income tax return (R. 189-190).

The court of appeals rightly held, contrary to petitioner's principal contention in this Court (Pet. 2, 6-8), that the evidence of a pattern of joint criminal activity was sufficient to support his conviction on the conspiracy count. There was ample evidence for the jury to conclude that petitioner was a co-proprietor with Meadows (and possibly with Driscoll as well) of the gambling enterprises which the evidence showed were conducted at the houses in question. Petitioner was the joint owner with Meadows of one of the houses; he conducted the games; and he shared in the profits. He had a "stake in the venture". Cf. *Direct Sales Co.* v. *United States*, 319 U.S. 703, 713; *Ingram* v. *United States*, 360 U.S. 672, 676-677. Driscoll's telephone calls and attempted

calls to petitioner from Montana, following his successful interstate journey to collect from Jackson a portion of the latter's $50,000 gambling losses, warranted the jury's conclusion that petitioner was well aware of Driscoll's mission, concurred in it even if indeed he had not instigated it, and would benefit from it financially—as he was later to benefit from Trigg's $7,000 payment to Meadows. The inference was fortified by the fact that one of the uncompleted calls was followed immediately by a call to Gilbert, the gamblers' "banker", who the evidence showed was at the focus of the conspiracy, and at whose direction the cashier's check which Jackson delivered to Driscoll was made payable to the bank of which Gilbert was an officer. Similarly, petitioner's subsequent sharing in the fruits of Trigg's losses at the gambling parlor which he co-owned was evidence to support the inference that petitioner was likewise aware of, and agreed to, the interstate transaction by which Trigg discharged his indebtedness to Meadows.

Assuming, *arguendo*, that the court of appeals was right in concluding that the evidence fell short of what was required to sustain petitioner's conviction as an aider and abetter of the substantive offenses charged in counts 1 and 3—Driscoll's interstate journey and Meadows' interstate transportation of the Trigg check (the offenses, in substance, that were charged as the objects of the conspiracy)—it would not necessarily follow, as petitioner contends (Pet. 3-7), that the evidence was also insufficient to support the conspiracy conviction. The elements of aiding and abetting are not coterminous with those of conspiracy.

"Aiding, abetting, and counseling", as this Court observed in *Pereira* v. *United States*, 347 U.S. 1, 11, "are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy." The court of appeals here properly noted that "[t]he jury was not unreasonable in concluding, as it obviously did, that a conspiracy to lure out of state gamblers would most likely lead to the collection of gambling debts thus incurred by some form of interstate travel or communication and that Grimes foresaw such an eventuality" (Pet. App. C 24). This level of participation is sufficient to make petitioner a conspirator to violate the federal laws against the use of interstate facilities for promoting unlawful gambling activities, and the court of appeals was correct in affirming the jury's findings to that effect.

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted.

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